

**DEPARTMENT OF STATE REVENUE
LETTER OF FINDINGS NUMBER: 05-0413
Sales and Use Tax
For the Years 2004-2005**

NOTICE: Under IC 4-22-7-7, this document is required to be published in the Indiana Register and is effective on its date of publication. It shall remain in effect until the date it is superseded or deleted by the publication of a new document in the Indiana Register. The publication of this document will provide the general public with information about the Department's official position concerning a specific issue.

ISSUES

I. Sales and Use Tax- Imposition

Authority: IC 6-8.1-5-1(b), IC 6-2.5-2-1

The taxpayer protests the imposition of sales tax.

II. Tax Administration- Ten Percent Negligence Penalty

Authority: IC 6-8.1-10-2.1, 45 IAC 15-11-2(b), 45 IAC 15-11-2(c)

The taxpayer protests the imposition of the ten percent negligence penalty.

STATEMENT OF FACTS

The taxpayer became a corporation in 2003 and was formerly a sole proprietorship for 2001 and 2002. The taxpayer's sales are primarily marketing signs for realty agents, apartment complexes, contractors, property managers, and retail establishments. At issue are the signs, banners, monuments, etc. that are custom made for each customer. The Department conducted an audit covering the period January 1, 2004, through June 30, 2005. The audit brought the taxpayer up to date for the reporting of sales tax. No records were provided at the time of the audit so the audit was completed based upon the best information available. After an audit, the Indiana Department of Revenue, hereinafter referred to as the "department," assessed additional sales tax, interest, and penalty. The taxpayer protested the assessment. At the taxpayer's request, this Letter of Findings is based upon the documentation contained in the file and additional documentation supplied prior to hearing.

I. Sales and Use Tax-Imposition

The notice of proposed assessment is prima facie evidence that the department's claim for the unpaid tax is valid. The burden of proving that the proposed assessment is wrong rests with the person against whom the proposed assessment is made. IC 6-8.1-5-1(b).

Indiana imposes a sales tax on retail sales of tangible personal property in Indiana. The sellers of the property are required to collect the sales tax from the purchasers and remit that tax to the state unless the sale qualifies for a statutory exemption. IC 6-2.5-2-1.

The taxpayer states that the Department used invoices mailed in each period rather than the actual invoices that customers paid. The taxpayer's representative argues that the taxpayer is a cash basis taxpayer, and therefore the taxpayer does not collect the sales tax until the customer pays the invoice. The taxpayer contends the audit shows total amounts billed and not collected. Taxpayer provided computer printed invoices for 2004 through June of 2005. The invoices according to the taxpayer have been "printed as they have been issued." Taxpayer was careful to note that the Department should only "assess tax in the correct period when the moneys are collected."

A careful review of taxpayer's records reveals that none of the computer generated invoices contain sales tax. Also the computer generated invoices appear at times to be numbered out of sequence when compared with the date they were issued. Taxpayer has not accounted for, nor established the reason, for the missing computer generated invoices.

IC 6-2.5-2-1 states, "(a) An excise tax, known as the state gross retail tax, is imposed on retail transactions made in Indiana. (b) The person who acquires property in a retail transaction is liable for the tax on the transaction and, except as otherwise provided in this chapter, shall pay the tax to the retail merchant as a separate added amount to the consideration in the transaction. The retail merchant shall collect the tax as agent for the state."

The taxpayer's records show that they are not using a true cash basis. If they were, then over time the amount of sales tax collected and remitted would reconcile. In this case, this does not happen.

The taxpayer stated that some of their sales were to exempt entities. In the transactions that were not allowed in the audit, the taxpayer failed to provide any exemption certificates for the transactions that were made. The taxpayer provided an exemption certificated dated four months after the audit was completed. The Indiana General Sales Tax Exemption Certificate did not indicate why the transaction was exempt from taxation.

FINDING

The taxpayer's protest is denied.

II. Tax Administration- Ten Percent Negligence Penalty

DISCUSSION

The taxpayer protests the imposition of the ten percent negligence penalty pursuant to IC 6-8.1-10-2.1. Indiana Regulation 45 IAC 15-11-2(b) clarifies the standard for the imposition of the negligence penalty as follows:

Negligence, on behalf of a taxpayer is defined as the failure to use such reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer. Negligence would result from a taxpayer's carelessness, thoughtlessness, disregard or inattention to duties placed upon the taxpayer by the Indiana Code or department regulations. Ignorance of the listed tax laws, rules and/or regulations is treated as negligence. Further, failure to read and follow instructions provided by the department is treated as negligence. Negligence shall be determined on a case by case basis according to the facts and circumstances of each taxpayer.

The department has the authority to waive the negligence penalty pursuant to the provisions of 45 IAC 15-11-2(c) as follows:

The department shall waive the negligence penalty imposed under IC 6-8.1-10-1 if the taxpayer affirmatively establishes that the failure to file a return, pay the full amount of tax due, timely remit tax held in trust, or pay a deficiency was due to reasonable cause and not due to negligence....

In this case, the taxpayer has not submitted substantial documentation to indicate that its failure to collect and remit Indiana sales tax was due to reasonable cause.

FINDING

The taxpayer's protest of the penalty is denied.